No. 14656

United States Court of Appeals
For the Ninth Circuit

HANS FORSTER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

QUESTIONS PRESENTED

The issues on this appeal are framed by the Specification of Errors set forth in appellant's brief. The second and third questions stated by appellee on pages 1 and 2 of his brief are not questions raised by this appeal. They do not relate to any order or ruling to which appellant objects as having introduced error into the record below. The statement of these questions can only be an attempt to induce this Court to decide this appeal upon its view of the evidence, rather than upon the issues which the appellant has brought before it.

"COUNTER-STATEMENT OF THE CASE" AND "EVIDENCE OF FORSTER EVASION"

These phases of the appellee's brief do not go to the specific issues raised on this appeal. The only possible purpose of this summation of the evidence is an attempt to show that the evidence of appellant's guilt

was so overwhelming that the errors assigned by the appellant were not prejudicial.

Appellant's view of the evidence differs sharply from that of appellee. We believe that the record contains substantial evidence of lack of any willfulness on the part of appellant. To the extent that it is necessary to review the evidence to determine if the claimed errors were prejudicial, appellant has done so in his opening brief.

It would, however, be unfair to the appellant to leave unchallenged many of the statements and omissions contained in appellee's summation of the evidence. Therefore, appellant's view of this evidence is contained in the Appendix to this brief insofar as it is not directly germane to the issues raised by this appeal.

REPLY ARGUMENT

I. The Supplemental Instruction to the Jury Was Erroneous

Appellant does not dissent from the comments of appellee upon the trial court's instructions as set forth in pages 15-17 of his brief. Appellant does not appeal from any matter contained in the *original instructions.* The heart of this appeal is the *additional instruction* on the subject of willfulness which was given at the special request of the jury and which appellant, upon the authorities stated in his opening brief, believes to be erroneous.

Appellant does take issue with appellee's statement (appellee's brief, p. 17) that "The instructions should be considered as a whole * * *" for the reasons set forth

in Mr. Justice Frankfurter's opinion in the case of *Bollenbach v. United States,* 326 U.S. 607. Moreover, as appellant has stated in his opening brief, the error in the instant case is greater than that in the *Bollenbach* case because the trial judge made it plain that by the additional instruction he was giving to the jury a separate, independent and alternative standard by which the jury might decide the issue before them. This, in effect, constituted a direction by the trial court to disregard the previous instructions if the jury found the additional instruction easier to use.

Appellee attempts to distinguish the *Bollenbach* decision on the ground that the trial court there gave "an equivocal instruction." He states that the cases cited by appellant as following the *Bollenbach* decision " * * * are not on the supplemental instruction phase but on equivocal instructions * * * " (appellee's brief, p. 20).

The distinction, if there be one, favors the appellant. For the supplemental instruction given by the trial court was not only "equivocal," but in fact has been held by this court to be "plain error." *Bloch v. United States* (C.A. 9, 1955) 223 F.2d 297.

As noted at pages 43 and 92 of appellant's brief, *Herzog v. United States* (C.A. 9, 1955) 226 F.2d 561, did not overrule the substantive aspect of the *Bloch* cases. The question there was procedural and this court held that an appellant who has not taken exception to a portion of the charge, as required by the Federal Rule of Criminal Procedure 30, may not assign that

portion of the charge as error under the provisions of Federal Rule of Criminal Procedure 52(b).

Appellee has failed to distinguish the language complained of in the additional instruction before this court from that used in the *Bloch* case. The word "negligence" is not used in the *Bloch* instruction as stated by appellee on page 33 of his brief. In fact, the *Bloch* instruction which this court held to be "plain error" was less damaging than the additional instruction in this case since it did not include the dubious words "stubbornly, obstinately, perversely." Such words do not measure up to the criterion of the felony of tax evasion: the specific wrongful intent to evade a known tax obligation.

It must be pointed out that the appellee's citations from *Hargrove v. United States* (C.A. 5, 1933) 67 F.2d 820, and *United States v. Martell* (C.A. 3, 1952) 199 F. 2d 670, are in each case taken from the decision of the trial court which was reversed on appeal. Both cases are correctly cited in the brief of appellant at pages 34-35.

Appellant does not rely upon the case of *Morissette v. United States,* 342 U.S. 246. The issue in that case was an erroneous instruction the matter of presumption and the case is cited in the brief of appellant only because it is fundamental to the decision in *Legatos v. United States* (C.A. 9, 1955) 222 F.2d 678, wherein the *Murdock* instruction (see footnote 3, page 22, appellant's brief) was also used.

Appellee cites the case of *Friedberg v. United States,* 348 U.S. 142, as lending approval to the use of the *Mur-*

dock instruction. Only a portion of the *Murdock* instruction was there used; elements are specifically omitted which this Court found to be erroneous in its decision in the *Bloch* case.[1] Moreover, there was no exception by appellant to this portion of the charge and it does not appear that this instruction was raised or argued on appeal. Indeed, the opinion in the Court of Appeals (C.A. 6, 1953) 207 F.2d 777, shows "no exception being taken to the charge."

The same is true of *Remmer v. United States* (C.A. 9, 1953) 205 F.2d 277, where it appears that the use of this instruction was not one of the issues raised on appeal, argued or determined by this Court.

Appellant contends that the brief of appellee has in no way met appellant's basic argument on this phase of the case: That the *Murdock* language has been declared erroneous by this Court in the *Bloch* case; that the giving of the additional, separate and erroneous instruction on willfulness at the special request of the jury was prejudicial error.

II. The "Kachlein Affair" Should Have Been Excluded From the Trial

Appellee's brief firmly substantiates the argument contained in the brief of appellant that the introduc-

---

[1]This language, declared erroneous in the *Bloch* case, was not used in the *Friedberg* case: "It [willfulness] includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act." Such language was used in the additional instruction assigned as error in the instant case.

tion of this issue into the trial was erroneous. The Government's position, as indicated by the brief of appellee, is that this issue was immaterial and irrelevant. Thus, appellee states, at page 23 of his brief, that:

> "The Government took the position from the beginning that these matters were immaterial * * * "

Page 24 contains Mr. Moriarty's statement, in support of his motion to strike, that the testimony of Kachlein was "immaterial and irrelevant."

Appellant contends, at page 25 of his brief, that:

> "The Government took no part in the proceeding and urged its exclusion."

And appellee concludes at page 26 of his brief that:

> "Every consideration was given to each of the contending parties to present *this immaterial phase of the case* * * * " (Emphasis supplied)

The fact that the Government took no interest in this issue does not expunge the error from the record. If the issue was irrelevant and immaterial, as contended by appellee, it was error to permit the jury to consider it.

The reasons for the exclusion of this evidence are plain. Materiality relates to the *"factum probandum"* or the proposition to be established in the case. Relevancy relates to the *"factum probans"* or the facts evidencing the proposition to be established. To state, as appellee has done, that the Kachlein issue is immaterial is to state that it is wholly outside of the propositions which were sought to be established by this case, *i.e.,* the guilt or innocence of the defendants. Once it is understood that immateriality imports a foreignness

to the propositions to be proved in a particular case, the reasons for the necessity of its exclusion are clear, as is the prejudice inherent in the admission of such testimony.

What is logically relevant may also be excluded on the grounds of practical policy. The reasons are set forth by Wigmore at § 29(a) of Wigmore on Evidence as follows:

> "For example, the moral disposition of an accused may be probatively of considerable value as indicating the probability of his doing or not doing a particular act or crime, yet it may be excluded because of the *undue prejudice* liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character * * * Again, in proving the dangerous qualities of a place or a machine, repeated instances of its injurious operation would be of high probative value; yet the unrestricted admission of such instances might result in so multiplying the subordinate issues in a cause that *confusion of mind* would ensue and the main controversy would be lost sight of in the great mass of minor issues * * * "(Emphasis the author's)

No more brilliant example of the correctness of this policy can be found than in this case. For weeks at a time the attention of the jury was completely distracted from the principal propositions of the case to the admittedly immaterial issue of the Kachlein-Taylor relationship. Nothing could have more seriously prejudiced the appellant in the defense of a tax fraud case for this was an accusation of yet another fraudulent conspiracy.

Appellee contends that no harm was done to appellant by the exposition of this issue because appellant had every opportunity to present his side of the case. The harm to the appellant was not in the handling of the issue once it had been admitted, but in admitting it at all. Treatment of issues which are immaterial and irrelevant in the most scrupulously fair manner, cannot justify their initial entry into the record.

Appellee insists that after the indictment was returned, " * * * Kachlein could have withdrawn then, but for reasons of his own, remained" (appellee's brief, p. 25).

Kachlein's withdrawal could not have prevented Taylor's counsel from attempting to inject this issue into the case. For the so-called "issue" was in existence on the day that Taylor released Kachlein as his attorney. The solution to this problem was not the withdrawal of Kachlein but the withdrawal from the jury of this immaterial and irrelevant issue.

Appellee states that:

> "Forster employed Kachlein at the end of March, 1950 (R. 1356). Kachlein and Forster went to Washington, D.C., about taxes (R. 1426), and Kachlein did not advise after April 25, 1950, that there was any conflict of interest (R. 1597-1598)." (Appellee's brief, p. 22)

The inference is that Kachlein accompanied appellant to Washington, D.C., prior to April 25, 1950. The fact, as shown by the testimony of appellant (R. 1427-1428) is that he and Kachlein went to Washington in late 1950 or early 1951, clearly after Taylor had released Kachlein as his attorney.

The suggestion is contained at page 24 of appellee's brief that Taylor had released Kachlein on October 25, 1950, in "civil matters" only. We believe that the record is clear that on October 25, 1950, there was a total severance of the relationship of Taylor and Kachlein insofar as all of the affairs of appellant were concerned.

The appellee's concession that this issue was immaterial and irrelevant should lend strength to appellant's own argument on this phase of the case. The ultimate effect of this issue must have been upon the credibility of appellant, for Taylor was acquitted in spite of appellee's belief that there was more than sufficient evidence of Taylor's guilt and appellee's statement, at p. 12 of his brief, that:

> " * * * we think the record shows they [Taylor and Erickson] actively participated in the evasion."

III. Appellant's Offered Rebuttal Testimony Was Erroneously Rejected

The basic error in appellee's concept of the admissibility of the rejected rebuttal testimony upon which appellant assigns error arises from his viewpoint that the only issues in the case were those framed by the Government. In referring to the proffered rebuttal testimony of Egenes, appellee states, at page 27 of his brief:

> "The Government had objected to this evidence as it merely demonstrated some inaccuracies on Finstad and Utgard's books and the issue before the jury was the amount received from Finstad and Utgard by Forster which was unrecorded."

With respect to the proffered rebuttal testimony of Ellis, appellee states at page 31 of his brief:

> "The proffered rebuttal by Quentin Ellis is a unique attempt to allege error, and the assertion that knowledge on Taylor's part of Forster's savings account was a vital issue strains the imagination."

The proposition which the prosecution sought to prove was that the appellant, Taylor and Erickson, had acted jointly to evade the income taxes of appellant and of Issaquah Creamery Co. The proposition which the appellant sought to prove was that he had not willfully evaded tax and that he had relied in good faith upon his bookkeeping and accounting personnel. These issues raised by appellant were as valid as the issues submitted by the prosecution. The jury's decision was bound to rest upon the evidence adduced in support of the issues as framed by the various parties. If vital testimony in support of the issues raised by appellant was rejected, the effect was bound to be prejudicial. It should never be forgotten that the testimony of appellant and of Taylor was frequently in direct conflict; and that appellant was convicted and Taylor acquitted.

The principle upon which the admissibility of evidence in support of the issues raised by appellant rests is well stated in Wigmore on Evidence, at § 36:

> "It has thus been seen that every evidentiary fact or class of facts may call for two processes and raise two sets of questions: (1) the admissibility of the original fact from the proponent; (2) the admissibility of explanatory facts from the opponent.

> "(1) The first is subjected to the test whether the claimed conclusion is a probable or a more probable one, having regard to conceivable interpretations of the fact * * *
>
> "(2) The second process consists in explaining away the original fact's force by showing the existence and probability of other hypotheses; for this purpose other facts affording such explanations are receivable from the opponent * * * "

Appellant has attempted carefully to analyze the significance of the offered rebuttal testimony in his opening brief (pages 47-70) and will not now attempt to repeat that analysis. It is sufficient to say that in each case the purpose of the testimony was two-fold: To show the commission of affirmative acts by Taylor indicative of his primary responsibility; and to show the utter want of credibility of Taylor's testimony.

Appellee's statement, at page 30 of his brief, that:

> "The court rather completely eliminated Finstad and Utgard from consideration in its final charge to the jury (R. 2656-2657) * * * "

is not factually correct. The trial court in that portion of the charge referred only to certain payments to Mary Finstad arising out of the contract for the purchase of the enterprise by appellant. Other matters at Finstad & Utgard were not excluded from the attention of the jury.

In summary, the offered rebuttal testimony went to the heart of the defense issues raised by the appellant. Whether Taylor was a practiced and habitual manipulator of financial statements, whether he had knowledge of the principal bank account in which the bulk of the unrecorded income was deposited and whether he

was responsible for certain alterations in the books of one of appellant's corporations were all vital to a true understanding of the role which Taylor played in appellant's affairs. Beyond that there was always at stake the issue of the credibility of Taylor. The rejection of this rebuttal testimony left the testimony of Taylor in those respects unchallenged; the verdict of the jury followed.

IV. The Errors Committed by the Trial Court Were Prejudicial to Appellant

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 U.S. at 294, 84 L.ed. 260, 60 S.Ct. 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States,* 328 U.S. 750, 764.

There should be little doubt that the errors complained of on this appeal had a substantial influence and were not harmless errors of the type condoned by Federal Rule of Criminal Procedure 52(a). That the

erroneous additional instruction on willfulness was prejudicial is made clear by the opinion in the *Bollenbach* case where the court said:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks * * *
>
> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelled out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must, therefore, be disregarded. [February 26, 1919] 40 Stat 1181, c 48, 28 USCA §391, 8 FCA title 28, § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical

errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency." 326 U.S. 613-615.

When this Court, on petition for rehearing, reconsidered the effect of the *Murdock* instruction in the *Bloch* case, it based its holding upon the *Bollenbach* decision:

> "The instruction with which we are concerned goes to the intent, an essential element of the offense. This is not a case of instructions which are merely ambiguous or confusing or where conflicting instructions deal only with incidental matters in the trial. As stated in Bollenbach v. United States, 326 U.S. 607, 613, 66 S.Ct. 402, 405, 90 L.ed. 350, 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' It is with that in mind that we have come to the conclusion that in this particular case, in the light of the specific instructions here given, we cannot say as was said in Bateman and Legatos that the instruction here involved was not prejudicially erroneous."

The numerous authorities indicating the prejudicial effect of introducing into this case the so-called "Kachlein Issue" are found in pages 83-88 of appellant's brief. And the prejudicial effect of the rejection of appellant's proffered rebuttal testimony is best shown by a consideration of the purposes for which it was offered as shown in the appellant's opening brief and in this reply brief and the result which followed its rejection.

CONCLUSION

For the reasons stated, the judgment of guilty as to the appellant should be reversed and the cause remanded for new trial.

Respectfully submitted,

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APPENDIX

Certain additional references to the record should assist in correcting the impressions created by those facts selected by appellee in his "Counterstatement of the Case" and "Evidence of Forster Evasion."

Appellant had nine years of formal schooling in Switzerland and had no bookkeeping or accounting training (R. 830). He served a two-year apprenticeship as a cheese maker (R. 832) before coming to the United States. When he acquired an interest in Issaquah Creamery Co., he maintained the then-existing bookkeeping and accounting arrangements (R. 859-860) which included the services of Taylor (R. 1510). Appellant was chiefly interested in the operating side of Issaquah Creamery Co. and various businesses which he later acquired, as distinguished from the accounting and financial aspects of those businesses. He instituted the production and sale of cottage cheese and ice cream mix and then developed a fresh milk distribution business in the City of Seattle (R. 861-870). This fresh milk operation later became Alpine Dairy (R. 881-886). Appellant was the chief salesman for all of his various operations. He built up the routes, including eventually 70 at Alpine Dairy and 45 at Apex Farms. He secured the jobbers and the basic wholesale customers of his businesses (R. 889). Arrangements for an adequate supply of milk were vital to this business; and appellant handled all of the relationships of his various businesses with the milk producers (R. 889, 922). Appellant was active in the field of labor relations (R. 923), and was chairman of the Labor Relations Committee of the Seattle Milk Dealers Association. Appellant was active in all phases of the dairy industry, serving as a director of the Washington State Dairy Council, the Washington State Dairy Foundation, the Seattle Dairy Foundation and the Northwest and Regional Milk In-

dustry Foundation. He served on committees of the National Milk Industry Foundation (R. 928-929).

Appellant was active in civic and community affairs, serving as a school district director and as a leader in community chest activities and the Boy Scouts of America (R. 928-930). To these varied activities appellant testified he devoted seven days a week, thirty days a month and 365 days of the year (R. 924).

All of these activities precluded a close acquaintance on the part of appellant with the bookkeeping and accounting operations of his businesses. Appellant testified that he was unfamiliar with the books at Simonson & Forster (R. 875), at Alpine Dairy (R. 886); that he never had occasion to examine the books and records of Renton Ice & Ice Cream Co. (R. 894); and that he had nothing to do with the arrangements for the distribution of salary checks at that concern (R. 896). Appellant testified that he did not know how the Finstad & Utgard purchase price had been set up and he did not know how payments were made to Mrs. Finstad (R. 900). Appellant testified that he was unfamiliar with the financial arrangements of the Daisy Ice Cream Co. (R. 904-905) and that Taylor set up and himself ran the bookkeeping and accounting operations of Arctic Gardens (R. 910-911). Appellant testified that Taylor kept the corporate records of Apex Farms while Keck was in charge of the books (R. 913).

Appellant explained that he watched the costs of his products and the sale prices in order to determine whether he was making a profit (R. 925). This constituted his guide to business policy rather than any detailed knowledge of accounting procedures. On the vital issue of expenditures charged to the various businesses, appellant testified that he did not personally know how these charges had been handled on the books (R. 935).

The ultimate fact was that appellant had never made an entry upon any of his books of account (R. 998), since he believed that all bookkeeping and accounting functions were being ably supervised by Taylor (R. 972). It is important to note that appellant was unable to make any distinction between Alpine Dairy, Issaquah Creamery and his own personal funds. He believed that these were interchangeable since these were wholly-owned enterprises (R. 1054-1055).

By way of contrast, Taylor was twice president of the Seattle Association of Licensed Public Accountants and twice president of the Washington State Association of Licensed Public Accountants (R. 1510). He maintained the general ledger of Issaquah Creamery Co. and prepared its tax returns (R. 1517-1526). He was secretary and a director of the company (R. 883). Taylor set up the books of Simonson & Forster, Inc., and was secretary-treasurer (R. 871-874). Taylor set up the books and bookkeeping department of Alpine Dairy (R. 881-887). Taylor set up the books and records of Renton Ice & Ice Cream Co. and was secretary and treasurer (R. 893-896). He performed the same function at Finstad & Utgard where he was secretary and treasurer (R. 896-901). Taylor was an incorporator of Arctic Gardens, Inc., was secretary-treasurer and ran the bookkeeping system (R. 909-911). Finally, Taylor supervised the accounting operations at Apex Farms, Inc., and was secretary-treasurer (R. 911-914). When, on several occasions, appellant asked Taylor if he desired additional accounting help, Taylor declined and "he advised them that everything was under control, and we didn't need any extra help" (R. 966-967).

It is important to note Taylor's intimate relationship to all of these enterprises in which appellant had an interest in order to understand Taylor's responsibility in the matter of intercorporate transactions. Tay-

lor made out all income tax returns which had ever been filed by appellant, by any member of appellant's family, or any corporation in which appellant had a working interest until Taylor's activities were terminated by his prison term (R. 969-971).

Appellee states that diversion of income was accomplished by appellant at Issaquah Creamery Co. "without any help from Taylor" (brief of appellee, p. 9) by means of the deposit of unrecorded receipts into Account 198, stating that "Taylor had nothing to do with this account * * * " (brief of appellee, p. 10). Yet, appellant testified that Taylor had detailed knowledge of Account 198 and the items which went into it as the result of frequent discussions (R. 1433-1434). As an example, appellant testified that he had discussed with Taylor those Time Oil Company rebates (R. 1100-1103) to which reference is made at pages 12-13 of the brief of appellee.

Reference is made at page 13 of appellee's brief to certain testimony of Caroline Neukirchen. The quotation appears in its complete form as follows:

> "A. He told me that I was not doing anything wrong; and that he asked me, 'Are you withholding money from me?'; and I said, 'No, I wasn't withholding any money'; and he said, 'Well, you are not doing anything wrong then'; and he says so far as the quotas go, it was just that these particular accounts did not have their quota and that was the reason he wanted me to withhold the accounts, to protect the customer." (R. 143-144)

The testimony of appellant shows clearly the motivation for the failure to record certain sales during a war-quota period. There was no violation of any Governmental law or regulation and the whole situation arose out of a desire to dispose equitably of certain

surplus production for which quotas had not been allotted (R. 947-950, 1121-1124). The tax evasion motive does not appear from the record.

Appellant makes much of the system for the distribution of salary at Renton Ice & Ice Cream Co. (brief of appellant, pp. 13-14) leaving the impression that this was a situation created by appellant. To the contrary, the testimony of Schneider, the president of Renton Ice & Ice Cream Co., makes it clear that on every occasion he acted under the instructions of Taylor (R. 2726, 2729, 2731, 2732, 2734, 2737, 2744, 2747, 2748, 2750, 2754, 2755); and finally Schneider testified that he personally saw Taylor alter the accounts payable ledger of Renton Ice & Ice Cream Co. (R. 2765).

Appellee states (appellee's brief, p. 11) that at a 1950 meeting "Forster had complained about the profits [of 1949]." This was related to the alteration of 1949 accounts payable.

Appellant's testimony (R. 965, 1002) shows that he did not complain that the profit was too high for tax reporting purposes, but that he believed the figures were inaccurate and unrealistic in the light of the business experience of past years.